Alcohol and Drug Dependency Services, Inc. *and* Patricia A. Higgins, Petitioner and Civil Service Employees Association Inc., Local 1000, AFSCME, AFL–CIO. Case 3–RD–1251

August 27, 1998

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on November 10, 1997, and the Regional Director's Report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 48 for and 50 against the Union, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Regional Director's findings and recommendations, and finds that the election must be set aside and a new election held.

The Regional Director recommended setting aside the election because the Union did not timely receive the *Excelsior*[1] list of eligible voters. The Regional Director determined that the late receipt was caused by: (1) the Region erroneously directing the Employer to provide it with the *Excelsior* list by October 31, 1997, rather than October 30;[2] and (2) the Region's waiting until November 3 to mail the list to the Union, rather than mailing it upon its October 31 receipt. As a consequence of the Region's actions, the Regional Director found that the Union did not receive the list until November 5, 5 days before the November 10 election.

The Regional Director further determined that, under extant law, a new election was warranted because of the Union's late receipt of the eligibility list. See, e.g., *Gerland's Food Fair*, 272 NLRB 294 (1984) (new election ordered where list received 6 days before election); *McGraw Edison Co.*, 234 NLRB 630 (1978) (list received 8 days before election); *Coca-Cola Co. Foods Division*, 202 NLRB 910 (1973) (list received "only hours before the election"). Noting that the primary purpose of the *Excelsior* requirements is to permit all employees fully to be informed of the arguments concerning representation, so that they can freely exercise their Section 7 rights, the Regional Director concluded that the late delivery of the list in the instant case interfered with this purpose. In recommending a new election, the Regional Director relied particularly on the facts that unit employees were spread over five locations and that the election margin was extremely close.

The Employer excepts, arguing that the Regional Director erred in setting aside the election. The Employer asserts that there is neither a claim nor evidence that the Union was prejudiced by its November 5 receipt of the *Excelsior* list. The Employer argues that the cases cited by the Regional Director are distinguishable because, in each, late delivery of the list was affirmatively found to have "prejudiced" or "substantially prejudiced" union efforts to reach unit employees.[3] Relying on *Red Carpet Bldg. Maintenance Corp*., 263 NLRB 1285 (1982), the Employer contends that the election results should be certified because the Union "has not established that it was *prejudiced materially* in its ability to communicate with employees by this minor delay." Id. at 1286 (emphasis added).[4] Rather, as in *Red Carpet*, the Employer contends that when the Union agreed to an election in the shortest possible time frame (17 days following approval of the election agreement) it thereby assumed the consequences of its agreement. The Employer further asserts that when the Union received the October 24 letter from the Region establishing Friday, October 31, as the deadline for the Employer to provide the *Excelsior* list to the Region, the Union knew that it likely might not receive the list until Monday, November 3 (7 days before the election). Notwithstanding this knowledge, the Employer argues, the Union took no steps to immediately obtain the list from the Region or to postpone the election when the list was not received on November 3. Finally, the Employer asserts that the Union's status as the incumbent bargaining representative, with established lines of communication with unit employees, demonstrates that it was not prejudiced by any delay in receiving the *Excelsior* list.

The Union argues that its *Excelsior* objection should be sustained, and the election set aside, regardless whether prejudice is shown. The Union argues that the focus of the *Excelsior* requirements is not on attributing blame, but on "leveling the playing field" and ensuring that employees are fully informed and freely able to exercise their Section 7 rights. The Union distinguishes *Red Carpet*, arguing that it involved a smaller bargaining unit, a wider vote margin, and union receipt of the eligibility list 6 instead of 5 days before the election. The Union further contends that, subsequent to *Red Carpet*, the Board has ceased requiring unions to cure a late delivery, or to attempt to postpone an election, in order to preserve their *Excelsior* objection. *Mod Interiors, Inc*., 324 NLRB 163 (1997). Finally, the Union argues that

[1] *Excelsior Underwear*, 156 NLRB 1236 (1966).

[2] October 30 was the 7th day after approval of the Stipulated Election Agreement, and the date by which the eligibility list was required to be provided to the Region.

[3] Further, the Employer distinguishes *Coca-Cola*, supra, and *McGraw Edison*, supra, noting that in both cases the unions had attempted either to obtain the list or to postpone the election when the list was not promptly provided.

[4] See also *Sprayking, Inc*., 226 NLRB 1044 (1976) (union not prejudiced when it received list 4 to 5 days before election).

even if prejudice were a necessary element of a meritorious *Excelsior* objection, prejudice is established because the unit consists of five locations and the vote margin was extremely narrow.

For the reasons stated by the Regional Director, we agree that the election should be set aside.[5] Thus, contrary to the *Excelsior* requirements, the Employer did not provide the list to the Region within 7 days of the Regional Director's approval of the election agreement. Further, contrary to established Board procedure, the Region, upon receipt of the list, did not immediately mail it to the Union.[6] To be sure, both delays were attributable to the Region and not the Employer–first, when the Region wrote the Employer that the list was due on a date that was the *8th* day after approval of the election agreement and, second, when the Region failed to mail the list until 3 days after receipt. However, we do not find this fact determinative. See, e.g., *Avon Products*, 262 NLRB 46, 48 (1982); *McGraw Edison*, supra, 234 NLRB at 631; *Coca-Cola Co. Foods Division*, supra, 202 NLRB at 910–911. Rather, the relevant inquiry is whether the delay–however caused[7]–interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be informed of the arguments concerning representation, so that that they can fully and freely exercise their Section 7 rights. *Mod Interiors*, supra. Here, we find that the delays, which resulted in the Union's receiving the list only 5 days before the election, interfered with this purpose. See, e.g., *Brunswick Corp.*, 206 NLRB 532 (1973) (election set aside where list received 6 days before election); *Coca-Cola Co*., supra.[8] In reaching this result, we also rely on the facts that unit employees are dispersed over five locations, the unit is relatively large, and the vote was extremely close.[9]

Accordingly, we find that the election must be set aside and a new election directed.

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I would not set the election aside based on the "delay" in furnishing the *Excelsior* list to the Region or the "delay" in the Union's receiving the *Excelsior* list. Accordingly, I would overrule Objection V and remand the Union's remaining objections to the Region for appropriate action.

It is well settled that the *Excelsior* requirements are not to be mechanically applied, but should be evaluated in light of all the relevant circumstances. See, e.g., *McGraw Edison Co*., 234 NLRB 630 (1978). Under all of the circumstances here, it is clear that a new election is not warranted on this basis. First, I find that the Employer was in substantial compliance with the Board's *Excelsior* requirements. Thus, pursuant to the Region's October 24, 1997 written directive, the Employer supplied the list to the Region on Friday, October 31, as requested. Although the Region should have informed the Employer that the due date was October 30, neither this error nor the Region's subsequent delay in mailing the list to the Union on November 3, were attributable to the Employer.

Where, as here, the delays are not attributable to the Employer, the Board will set aside the election only if the Union can show that it was materially prejudiced by the delay.[1] The Union failed to establish such prejudice. Indeed, when the Union filed its postelection objections, it did not even claim, let alone demonstrate, that it was

[5] Because we adopt the Regional Director's recommendation to direct a second election based on the Union's late receipt of the *Excelsior* list, it is unnecessary to pass on the Regional Director's alternative recommendation that the Union's remaining objections be set for hearing. Accord: *McGraw Edison*, supra, 234 NLRB 630 at fn. 3.

[6] Indeed, as the Board recently made clear in *Mod Interiors*, supra, the union was "entitled to receive the list as soon as it is filed." Cf. Sec. 11312.2 of the Board's Case Handling Manual (Part 2), Representation, which provides that the list should be mailed to all parties "[i]mmediately on receipt."

[7] As the Board held in *North Macon Health Care Facility*, 315 NLRB 359, 360 (1994), the *Excelsior* rule was not promulgated to test employer good faith, but to ensure that the parties had access to all eligible voters.

[8] We agree with the Regional Director that this delay "prejudiced" the Union by diminishing the time during which it could communicate with unit employees. We do not agree with the dissent's interpretation of "prejudice." Thus, although in some cases "prejudice" has been shown by evidence of specific acts that a union had planned, but was precluded from undertaking, due to late receipt of the list (See, e.g., *McGraw Edison*, supra; *Gerland's Food Fair*, supra.), such tangible evidence is not required. Indeed, as to the late receipt of the list by the Region, the Board has made clear that prejudice to the union is not a necessary element. *Auntie Anne's*, 323 NLRB 669 (1997) ("[D]ue to the 'prophylactic' nature of the requirement, evidence of employer bad faith or a showing of actual prejudice to a union is unnecessary, in light of a preference for a "strict rule that encourages conscientious efforts to comply," quoting *North Macon Health Care Facility*, supra, 315 NLRB at 361). And, as to the Region's subsequent delay in providing the list to the Union, the Board, in comparable circumstances, has found "prejudice." Thus, for example, in *Coca-Cola*, supra, the Board concluded that the union was prejudiced when it received the list only hours before the election. See also *Gerland's Food Fair*, supra (union suffered substantial prejudice by receiving list only 6 days before election).

Similarly, we find unpersuasive the dissent's reliance on the fact that the Union, as the incumbent representative of the employees, had possible alternative means of obtaining the employees' names and addresses. The *Excelsior* requirement applies to all elections, and a union's ability or inability to obtain the *Excelsior* information through alternative means in no way affects or substitutes for the *Excelsior* requirements.

[9] We agree with the Regional Director that *Red Carpet*, supra is distinguishable. In *Red Carpet*, there was only a 1-day delay in the union's receiving the list, the unit was substantially smaller, employees were located at a single facility, and the vote margin was larger. Although, in *Red Carpet*, the Board noted that the union had not requested that the election be postponed, as we previously stated, such request is not necessary to establish prejudice. *Mod Interiors*, supra.

[1] *Red Carpet Bldg. Maintenance Corp*., 263 NLRB 1285 (1982); *Gerland's Food Fair*, 272 NLRB 294 (1984); *Avon Products*, 262 NLRB 46 (1982). In *Mod Interiors, Inc*., 324 NLRB 163 (1997), the fault lay with the employer's incorrect addresses.

prejudiced by any delay in receiving the list. Further, inasmuch as the Region's October 24 letter set October 31 (Friday) as the final date for its receipt of the list, the Union knew, or should have known, that it would likely not receive the list until November 3 (Monday). Although this would leave only 7 days for use of the list, the Union did not protest this fact. And, when the Union failed to receive the list from the Region on November 3, it did not notify the Region or the Employer. The Union also did not attempt to secure the list earlier (e.g., by going to the Regional Office), or request that the election be postponed. See, e.g., *Sprayking, Inc.*, 226 NLRB 1044 (1976); *Red Carpet Building Maintenance Corp*., supra.[2]

Finally, my colleagues assert that, absent the list, the Union would have difficulty communicating with the employees. However, the fact is that the Union has been the representative of the employees for over a year. Its stewards can communicate with the employees at the workplace. And, as the representative, it has been entitled, for over a year, to the names and addresses of unit employees.[3]

In sum, the Employer is blameless, and there is no showing that the Union suffered because of the delays. In these circumstances, it is unfair to the Employer, and unnecessary to the election process, to require that a new election be held.

[2] In *Sprayking*, the Board stated that the union's "failure to seek the list earlier, even though it knew its receipt was overdue, indicates that it did not really need the list prior to the time it actually received it." 226 NLRB at 1044.

[3] The majority argues that the *Excelsior* requirements apply to all elections, i.e., not only to RC elections but also to RD elections (where the union is the incumbent). As a matter of abstract principle, I agree. However, as discussed above, the instant case involves problems of delay that were caused by the Regional Office and which were not timely protested by the Union. In such circumstances, prejudice to the Union must be shown. In my view, the Union's incumbency, and the rights associated therewith, are relevant to that question.

The cases upon which the majority relies are clearly distinguishable. In *Auntie Anne's*, 323 NLRB 669 (1997), the list was submitted to the Region 12 days late. In the instant case, the list was submitted on the date that the Region requested it, and only 1 day "late" if the Region's erroneous direction is disregarded. In *Coca-Cola Co. Food Division*, 202 NLRB 910 (1973), the union received the list only hours before the election. In the instant case, the Union had the list for 5 days. In *McGraw Edison*, supra, the union showed specific facts that it was prejudiced by the delay in receiving the list. In *Brunswick Corp.*, 206 NLRB 532 (1973), the problem was that the decertification petitioner had the list for 4 days more than the union.

Finally, my colleagues have turned equity on its head. According to the majority, the die was cast on October 31. On that day, the Regional Office knew, or should have known, that the list was received 1 day late (under the *Excelsior* rule), that it would not be sent until Monday, November 3, and the Union would likely receive it only 5 days before the election. The Region nonetheless proceeded to the election. At that point, according to my colleagues, it was a win-no lose situation for the Union, and a lose-no win situation for the Employer. That is, a Union victory would result in a certification and a Union loss would result in another election. And, significantly, the Employer faced this bleak prospect through absolutely no fault of its own. It followed the Region's instructions to the letter. In these circumstances, and where there is no showing of any prejudice to the Union, it is unfair to the Employer and unnecessary to the process, to have a second election.

In these circumstances, I find no basis for setting aside the election. Accordingly, I would overrule Objection V and remand the Union's remaining objections to the Region for further appropriate action.